Filed 12/10/12 In re Nathaniel A. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re NATHANIEL A., et al., Persons Coming Under the Juvenile Court Law.	B237467
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK89596)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Judgment reversed in part, affirmed in part. Orders reversed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

L.B. (mother) appeals from a judgment declaring her children to be dependents of the court pursuant to Welfare and Institutions Code[1] section 300, subdivision (b).[2] She contends that the evidence was insufficient to support a finding of jurisdiction as to her. We agree and will reverse the judgment in part and any orders based thereon.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has three children: Nathaniel A., born in December of 2003; Nicholas M., born in September of 2006; and K.W., born in September of 2010. Their respective fathers are Norberto A.,[3] Fred M., and M.W.[4] Mother was dating M.W. when the family came to the attention of the Department of Children and Family Services (DCFS).

On September 28, 2010, the Los Angeles County Sheriff's Department came to mother's home with a warrant to search for evidence of suspected "rock cocaine" sales being conducted from the location. After conducting the search, the officers stated in

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[1] All section references are to the Welfare and Institutions Code unless otherwise noted.

[2] Section 300, subdivision (b) states, in relevant part, that a child will fall within the jurisdiction of the dependency court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse."

[3] Norberto "has a past criminal history that includes misdemeanor and felony convictions involving narcotics and is currently on parole for Petty Theft with a Prior. [He] denies any current use of any type of drugs and completed substance abuse counseling, anger management classes and a parenting class for probation."

[4] M.W. also has a past criminal history that includes misdemeanor and felony convictions.

the incident report that they found and confiscated: one set of keys which were found in M.W.'s pocket, one functional digital gram scale which was found in the pocket of an XXXL shirt hanging in the closet, twelve bullets which were found in a dresser drawer and some miscellaneous paperwork found in the kitchen. They arrested M.W. and charged him with violating Penal Code section 29800[5] due to his being a convicted felon in possession of ammunition. He was later released. There is nothing in the record to indicate that mother was charged with anything or would be charged with anything. The officers contacted DCFS requesting an investigation.

DCFS opened an investigation. In its Detention Report, DCFS reported that "marijuana blunts" in an ashtray and a "few ounces of marijuana" were found in mother's home but did not specify when or where the marijuana was found. Notably,

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[5] Penal Code section 29800, states, "(a)(1) Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. [¶] (2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. [¶] (b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 23515, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, and who owns or has in possession or under custody or control any firearm is guilty of a felony. [¶] (c) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied: [¶] (1) Conviction of a like offense under California law can only result in imposition of felony punishment. [¶] (2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments." Prior to 2012, this provision was found in Penal Code section 12021. (Sen. Bill No. 1080 (2009-2010 Reg. Sess.) § 6.)

DCFS did not state in its report that such items were within the reach of the children. Also of note, the police report did not include any mention of marijuana that was either found or confiscated during the search. DCFS reported that M.W. "admitted to smoking marijuana and using cocaine," but that mother "denied using drugs." Later, DCFS reported that M.W. denied any current use of cocaine. M.W. denied ever using drugs in the presence of the children. Mother also denied that M.W. used any drugs in the presence of the children and she agreed to submit to a drug test, the results of which were negative.

DCFS also reported that the children's physician and teachers "reported no concerns or suspicions of abuse, neglect, or exploitation to any of the children." And DCFS noted, on numerous occasions, that "the children appeared well cared for including the 7 month old infant . . . [the older children] denied any type of abuse[,] . . . they feel safe in the home[, and] . . . that there was plenty of food in the home." The children also denied when asked by DCFS on numerous occasions that any drug use had occurred in the home or that any guns or ammunition have been in the home. Mother informed DCFS that she and the children were the only people living in the home.

Mother agreed to a Voluntary Family Maintenance plan with DCFS. As part of this plan, mother was required to test for drugs, attend parenting classes, and not allow M.W. to visit without contacting DCFS first, among other things. Mother attended school, majoring in Business Administration, and worked in the library of Southwest

College. Despite this busy schedule,[6] she was able to complete a number of parenting classes but not as many as DCFS would have liked. Additionally, mother failed to appear for drug testing on May 13, 2011 and June 6, 2011 and tested positive for cannabinoids on April 15, 2011, May 23, 2011 and June 24, 2011. As part of the plan, M.W. was also required to drug test, participate in parenting classes and "obtain/renew his license for medical marijuana." However, M.W. failed to take any classes and refused to drug test.

Due to M.W.'s and mother's lack of compliance with the voluntary plan, DCFS filed a petition on September 7, 2011. It was later amended on October 5, 2011. With respect to mother, the amended petition alleged in "Count B-1: The children['s] mother . . . is a user of marijuana which periodically interferes with mother's ability to provide regular care of the children including an incident on 9-28-10 in which mother created a detrimental environment by having . . . [K.W.]'s father, [M.W] . . . , possess marijuana in the children's home within access of the children. Further, on 8-18-11, 8-5-11, 6-24-11, 5-23-11, and 4-15-11, the mother had positive toxicology screens for marijuana. The mother's use of marijuana places the children at risk of physical and

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[6] The record appears to indicate that the parenting classes conflicted with mother's course work. She informed DCFS that "the only way she can go to her parenting class is if she ditches her Southwest class and goes to parenting." "CSW Epperson expressed the instability of her approach to her participation in parenting class," yet apparently offered mother no workable alternative. Despite this conflict, mother actually completed parenting classes on July 26, 2011, August 2, 2011, August 9, 2001 and August 16, 2011.

emotional harm." DCFS reported in a last minute information that social workers were unable to locate M.W. or Fred.[7]

In support of the allegations in the petition, DCFS referred the court to mother's failure to comply with the voluntary plan, including her marijuana usage, and to the incidents surrounding the police search of her home on September 28, 2010. DCFS reported that since the voluntary plan was put in place, "Mother's drug use is adversely effecting [sic] her decisions as a parent. This is demonstrated by mother's ongoing positive drug tests for marijuana and mother's failure to protect the children from the father, [M.W] . . . by allowing the children to be alone with the father."

From an interview on September 1, 2011, DCFS reported that "mother admitted that she does use [m]arijuana stating that she has been smoking marijuana only since the case has been open. When asked why she would begin using an illegal substance when she knows the Department is monitoring her usage. [sic] Mother stated that it was due [to] her feeling stressed and overwhelmed. Mother refused to say how she was obtaining the marijuana. Further she would not deny that she was obtaining the marijuana from father, [M.W.] During the [five] months that this case has been open, mother admits to continuing a relationship with the father, [M.W.] and that he has been in the home. Further she has stated that although DCFS advised mother against it, she

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[7] Counts B-2 and B-3 were alleged against M.W. and Count B-4 was alleged against Fred. Each of these three counts was sustained, as amended, and none of them is being appealed. We therefore do not need to discuss the details of these counts as they are not relevant to mother's appeal. The trial court's judgment and orders as to M.W. and Fred will be affirmed.

has allowed the father to be alone with the children while she was working and attending school."

At the detention hearing, the trial court found a prima facie case had been made for detaining the minors, that Norberto was Nathaniel's presumed father, M.W. was K.W.'s presumed father and Fred was Nicholas's alleged father. It ordered the three minors released to mother with DCFS supervision and ordered Nathaniel also released to Norberto. M.W. and Fred were ordered to have monitored visits after they contacted DCFS.

In its October 3, 2011 Jurisdiction/Disposition Report, DCFS reported that mother again admitted to using marijuana but denied ever doing so near her children or while her children were under her care. She stated that she only used it while out with her friends. With respect to M.W.'s marijuana usage, mother reported that "He kept the ashtray in the [dresser] drawer. They weren't anywhere where they were visible. The kids wouldn't get it to it. [sic] The sheet was covering it. (DI CSW observed that Mother hung up sheets to cover the entrances to the kitchen and to cover the heater in the living room and tabletops.) He had the scale for his personal use." Mother also stated that M.W. was never around while under the influence, she knew nothing of any cocaine usage, and that when he smoked marijuana, he smoked outside. Mother stated that M.W. would smoke "out in the alley or go outside the gate in front of the apartments . . . [a]fter a while, he would air out before he came back in. The kids would stay with me." Norberto reported to DCFS that, with respect to M.W., his son, Nathaniel, told him, " 'Whatever they are smoking, they usually smoke in the kitchen,

and they act like we can't smell it.' " There was nothing in the record, however, showing that mother and M.W. were smoking *marijuana* in the kitchen or that they ever smoked marijuana in the presence of the children.

In its Interim Review Report filed on November 3, 2011, DCFS noted that it had located Fred who claimed that he wanted to have unmonitored visitation with Nicholas. DCFS also reported that it was unable to locate M.W. By its last minute information statement filed on November 9, 2011, DCFS had reported that mother tested positive for cannabinoids three more times, on September 1, 2011, September 16, 2011 and October 7, 2011, and tested negative twice, on September 29, 2011 and October 18, 2011,[8] since the petition was filed. Mother also failed to appear for testing on two additional dates, July 13, 2011 and July 27, 2011.

The jurisdictional hearing was held on November 9, 2011. The trial court sustained Count B-1 against mother. The trial court found mother's usage of marijuana to be substantial and that she had a problem quitting. It declared all three children to be dependents of the court and ordered the children placed with mother under the supervision of DCFS. Nathaniel was also placed with his father, Norberto. Family maintenance services and monitored visitation by Fred and M.W. with their respective children with DCFS approval were ordered. M.W. was ordered to participate in

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[8] DCFS stated that the results of the negative test on October 18, 2011 were diluted. The lab technician, "Dennis," "reported that the comment showed [mother] drank a lot of extra water and that the dilution is 'okay' and 'good enough for testing.' " DCFS then reported that "Dennis stated that if there was a suspicion that the test result could have been positive, the result could have been negative because the specimen was too diluted."

individual counseling and to attend Alcoholics or Narcotics Anonymous meetings. Mother was ordered to participate in individual counseling and parenting classes, to attend Alcoholics or Narcotics Anonymous meetings and to submit ten clean consecutive random drug tests; if any were missed without a proper excuse or dirty, mother was ordered to participate in a full drug program. This appeal followed.

CONTENTION

Mother contends that the evidence did not support the trial court's finding of jurisdiction pursuant to section 300, subdivision (b) as to her.[9]

DISCUSSION

1. *Standard of Review*

"In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences.

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[9] If we were to reverse the judgment as to mother, dependency jurisdiction would likely remain over her children pursuant to the trial court's findings with respect to their fathers. A reviewing court may affirm a trial court's finding of jurisdiction over a minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence (here, the bases for finding jurisdiction as to the fathers is unchallenged). In such a circumstance, the court need not consider whether any or all of the *other* alleged statutory grounds for jurisdiction are supported by the evidence (*In re Alexis E*. (2009) 171 Cal.App.4th 438, 451). In this case, however, we elect to exercise our discretion and reach the merits of mother's challenge because the finding of jurisdiction as to her could be prejudicial or could potentially impact the current or future dependency proceedings (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015; see also, *In re I.A.* (2011) 201 Cal.App.4th 1484, 1494).

Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. Evidence from a single witness, even a party, can be sufficient to support the trial court's findings. [Citations.]" (*In re Alexis E., supra,* 171 Cal.App.4th at pp. 450-451.)

2. *There is No Substantial Evidence to Support the Trial Court's Jurisdictional Finding With Respect to Mother*

Count B-1 against mother essentially alleges that she cannot provide regular care for her children as a result of her marijuana usage and that she failed to protect the children by allowing M.W. to possess and sell marijuana in her house. Thus, pursuant to section 300, subdivision (b), DCFS, who had the burden of proving "jurisdictional facts by a preponderance of the evidence," (*In re D.C.*, *supra*, 195 Cal.App.4th at p. 1014), was required to show that the children have suffered, or there is a substantial risk that the children will suffer, serious physical harm or illness, (1) as a result of mother's inability to provide regular care for the children due to her substance abuse; or (2) as a result of mother's failure or inability to adequately supervise or protect the children. DCFS concedes that none of the children has suffered serious physical harm or illness and thus the question is whether the evidence was sufficient to find there was a *substantial risk* that the children will suffer serious physical harm or illness.

a. *There Was No Evidence Showing That Mother is a Substance Abuser*

With respect to (1), above, we held in *In re Drake M.*, that a predicate finding of substance abuse is necessary. (*In re Drake M.* (2012) ____ Cal.App.4th ____, ____.)

In addition, we held that such a finding must be supported by "evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM-IV-TR." (*In re Drake M.*, *supra*, ___ Cal.App.4th at p. ___.) Here, there was nothing in the record showing that mother had been diagnosed as having a current substance abuse problem and, therefore, we look to see if the record contains evidence establishing that she has a substance abuse problem as defined in the DSM-IV-TR.

"The full definition of 'substance abuse' found in the DSM-IV-TR describes the condition as '[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period: [¶] (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)[; ¶] (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)[; ¶] (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)[; and ¶] (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)' (DSM-IV-TR, at p. 199.)" (*In re Drake M.*, *supra*, ___ Cal.App.4th at p. ____.) Our

analysis of the record shows that DCFS failed to produce facts sufficient to satisfy any part of this definition.

First, there was no evidence showing that mother failed to fulfill any of her major role obligations at work, school, or home. In fact the only absences from school mentioned in the record were the result of DCFS's requiring mother to take parenting courses that conflicted with her school schedule. Second, there is no evidence that mother used marijuana in physically hazardous situations. Third, there is no evidence in the record that mother's marijuana usage resulted in any substance-related legal problems. Aside from a minor conviction for petty theft 13 years ago, which does not appear to be related to any substance use, mother has no criminal record. Finally, there is no evidence in the record that mother continued to use marijuana despite having persistent or recurrent social or interpersonal problems caused or exacerbated by it.

Our analysis of the record shows that it contains no evidence that mother has a substance abuse problem. In fact, the petition did not even allege that mother was *abusing* marijuana. As a result, the trial court's finding that jurisdiction based on this prong of section 300, subdivision (b), was not supported by the evidence.

b. *There Was No Evidence Showing That Mother Failed or Was Unable To Adequately Supervise or Protect The Children*

DCFS argues that the trial court's findings are supported by substantial evidence because mother's conduct placed the children at a substantial risk of harm. In support of this argument, DCFS asserts that mother repeatedly missed drug tests and tested

positive for marijuana, and that mother created a detrimental environment for the children by allowing them to be in M.W.'s presence.[10]

Although we do not condone the usage of illicit drugs under any circumstances, we've previously noted that the mere usage of drugs by a parent is not generally, by itself, a sufficient basis on which dependency jurisdiction can be found. (*In re Alexis E., supra*, 171 Cal.App.4th 438, 453 [" . . . [W]e have no quarrel with Father's assertion that his use of medical marijuana, *without more*, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court, not any more than his use of the medications prescribed for him by his psychiatrist brings the children within the jurisdiction of the court"]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, *6 ["It is undisputed that a parent's use of marijuana[, hard drugs, or alcohol] 'without more,' does not bring a minor within the jurisdiction of the dependency court"].) However, a finding of jurisdiction based on mother's use of marijuana may have been proper if the evidence showed that, as a result, she failed or was unable to adequately supervise or protect the children. DCFS failed to show any such link here.

To the contrary, the record shows that mother took good care of her children. DCFS repeatedly reported that "the children appeared well care for, including

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[10] DCFS also argued that mother failed to supervise or protect the children as evidenced by the fact that she attended fewer parenting classes than DCFS would have liked and that she argued with M.W., without any evidence of violence or other forms of escalated behavior, in front of the children. These arguments are entirely without merit as such actions are not generally considered negligent for purpose of section 300, subdivision (b).

the . . . infant." DCFS also reported that the children denied any kind of abuse or domestic violence occurring in the home and felt safe in mother's care; that there was plenty of food in the home; and that mother had no prior DCFS involvement. Mother's usage and testing positive for marijuana on drug screens, without more, is insufficient to show that her children were at substantial risk of serious physical harm or illness. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 453; *In re Destiny S.*, *supra*, 210 Cal.App.4th at p. *6.) In this case, DCFS failed to show that there was "more."

DCFS also did not produce evidence sufficient to show that mother failed to adequately supervise or protect the children by allowing M.W. to be in their presence. Although DCFS argues in its brief that mother "created not only a risk that the children would ingest illegal drugs, but that they might also be harmed during the physical violence often associated with illegal drug sales," citations supporting these allegations are noticeably absent therefrom. This is because the record does not include any evidence supporting DCFS's statements.

First, there was no evidence that the marijuana possessed by M.W. was within the reach of the children, that the children were ever left unsupervised so that the risk of ingestion was real, that mother neglected their needs, or that either mother or M.W. used marijuana in the presence of the children. (Cf., *In re Rocco M.* (1991) 1 Cal.App.4th 814, 825, [determining that the evidence was sufficient to support a finding of dependency under section 300, subdivision (b), because the mother created a risk of substantial physical harm, i.e., the ingestion of illegal drugs by the 11 year old minor, "(1) by placing or leaving drugs in a location or locations where they were available to

Rocco; (2) by frequent and prolonged absences which created the opportunity for Rocco to ingest the drugs; (3) by neglecting Rocco's needs in a way which might be reasonably expected to create the kind of emotional and psychological conditions in which substance abuse typically thrives; and (4) by exposing Rocco to her own drug use, thus impliedly approving such conduct and even encouraging him to believe that it is an appropriate or necessary means of coping with life's difficulties"].)

Second, although police officers invaded mother's home under the assumption that illegal drug sales were occurring there, there is no evidence that M.W. or mother were ever convicted, or even charged, with such crime afterwards. Instead, DCFS reported that M.W. was released a few days later and only charged with unauthorized possession of ammunition. There is no testimony or other evidence in the record showing that M.W. was actually selling any drugs. There was no evidence of any kind that any "physical violence often associated with illegal drug sales" occurred at any point in mother's home.

In addition to the lack of evidence showing that M.W.'s presence created a risk to the children, the evidence shows that he is no longer involved in the lives of the children or mother. As of the October 3, 2011 report filed by DCFS, mother was no longer allowing M.W. to visit with K.W. As of the jurisdictional hearing, M.W. could not be found.

There is no evidence in the record supporting the trial court's finding that mother failed to adequately supervise or protect her children.

3. *Conclusion*

Based on the foregoing, we find that the evidence in the record does not support the trial court's finding of jurisdiction based on section 300, subdivision (b). "Because of our conclusion that the jurisdictional findings must be reversed [as to mother], the dispositional orders [as to mother] must also be reversed. [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 137.)

DISPOSITION

The judgment is reversed in part as to the jurisdictional finding that pertains to L.B.'s conduct (Count B-1). In all other respects, the judgment is affirmed.[11] Any subsequent orders based thereon as to mother are also reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

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[11] See footnote 7, *ante*.